In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1106

DYMO INDUSTRIES, INC., AND MODULUX, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. xxiii) is not yet reported. The opinion of the district court (Pet. App. xiii) is reported at 300 F. Supp. 532.

JURISDICTION

The judgment of the court of appeals affirming the judgment of the district court was entered on December 19, 1969 (Pet. App. xxiv). The petition for a writ of certiorari was filed on January 22, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

375-867—70

QUESTION PRESENTED

Whether the Fourth Amendment requires a showing of probable cause as the condition precedent to the issuance of a grand jury subpoena *duces tecum*.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

This case arose out of a grand jury investigation into possible violations of the antitrust laws by individuals and corporations engaged in the sale of relocatable buildings of the type sold to school districts for use as classrooms. Pursuant to 28 U.S.C. 515, attorneys for the Antitrust Division were given written authority by the Attorney General to conduct grand jury proceedings within the Northern District of California and other districts. Subsequently, on the application of these attorneys, the clerk of the district court issued two identical grand jury subpoenas *duces tecum* (Pet. App. i–xii) addressed to two corporations, Dymo Industries, Inc., and Modulux, Inc., the petitioners here.

On April 18, 1969, Dymo and Modulux filed a motion to quash the subpoenas, which the district court denied after a full hearing in an extensive opinion (Pet. App. xiii–xx). Dymo and Modulux were therefore notified to appear before the grand jury on July 9, 1969, to produce the corporate documents demanded by the subpoenas. The corporations' attorney appeared on their behalf but refused to produce any documents whatsoever. He testified that his clients refused to produce on the ground that "We think that there is a very serious question as to whether the subpoena *duces tecum* complies with the requirements of the Fourth Amendment to the Constitution * * *" (Pet. 4).

On July 17, 1969, the United States moved for an order to show cause why Dymo and Modulux should not be found in civil contempt. After a hearing the court held Dymo and Modulux guilty of civil contempt and ordered that each pay a fine of $1,000 unless they produced the documents (Pet. App. xxi–xxii). On the appeal of Dymo and Modulux from the district court order, the court of appeals affirmed on the opinion of the district court on the motion to quash (Pet. App. xxiii–xxiv).

ARGUMENT

The courts below were correct in finding contumacious petitioners' refusal to comply with the grand jury's subpoena *duces tecum*. Further review—which would foreclose the possibility of compliance with the subpoena because the grand jury will expire[1]—is unwarranted.

[1] The grand jury has been continued to April 3, 1970.

The requirement of probable cause applicable to a search warrant under the Fourth Amendment does not govern the issuance of a subpoena *duces tecum* by a court in aid of a grand jury. That body's function as prescribed in the Fifth Amendment is inquisitorial—to determine from the examination of witnesses and documents whether there is sufficient cause to believe that a federal crime has been committed and that an indictment should issue. *Hale* v. *Henkel,* 201 U.S. 43. Thus probable cause is the result which a grand jury investigation may produce, not a condition precedent to the investigation itself. *Blair* v. *United States,* 250 U.S. 273, 283; *Hendricks* v. *United States,* 223 U.S. 178, 184. Witnesses subpoenaed *ad testificandum* may be examined although no charge is pending (*Hale* v. *Henkel, supra* at 65–66); the same is true, *a fortiori,* of corporate documents called for under a grand jury's subpoena *duces tecum.* To require a showing of probable cause before such a subpoena could issue "would stop much if not all of investigation in the public interest at the threshold of inquiry * * *." *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 213.

For these reasons this Court has consistently rejected any requirement of "probable cause" in the ordinary sense as a basis for issuance of an investigatory body's subpoena of corporate records. *United States* v. *Morton Salt Co.,* 338 U.S. 632, 642–643, 652; *Oklahoma Press Publishing Co.* v. *Walling, supra,* at 208–209. Although these cases concern administrative writs, their reasoning applies equally to grand jury

subpoenas, as the express language of the opinions states. See, also, *Hannah* v. *Larche,* 363 U.S. 420, 449 n. 30. As the court below correctly noted (Pet. App. xv–xvi), the authorities relied upon by petitioner are not to the contrary. The writ in *Hale* v. *Henkel, supra,* was condemned not for lack of probable cause but because its scope was unreasonably broad (201 U.S. at 76)—an issue not presented here (Pet. App. xiv). *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, involved an attempt by the government to obtain by subpoena evidence which it had discovered in an illegal search and seizure. *Boyd* v. *United States,* 116 U.S. 616, involved a method of enforcing a subpoena which incriminated without adversary proceedings: if the subpoena was not obeyed the facts alleged in it were conclusively deemed to be true. No such procedure is presented here.

The subpoenas to the petitioners would, of course, have been subject to being quashed if they were unreasonable, that is, if they were not relevant to an authorized inquiry or were excessively broad or otherwise oppressive. Unlike a search warrant, a subpoena can be tested, before it is enforced, in an adversary proceeding before a judicial tribunal, and such a proceeding in fact took place in this case. But the petitioners made no attempt to show that the subpoenas were unreasonable in any particular, and the district court properly rejected their general complaint of a lack of "probable cause."

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted.

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